

ISSUES

Respondent requested review of the following issues before the Appeals Board:

- (1) The finding that James T. Brady, D.C., was authorized by the employer to treat claimant.
- (2) The finding that claimant did not unreasonably refuse to cooperate with the employer-offered medical treatment.
- (3) The finding that Dr. Brady was authorized by the employer to treat the claimant from November 23, 1992, through April 19, 1993.
- (4) The Judge's failure to rule on the necessity for Dr. Brady's treatment.
- (5) The Judge's failure to rule on the issue of whether Dr. Brady's charges were reasonable and customary.
- (6) The nature and extent of claimant's injury and/or disability.
- (7) The finding granting claimant future medical treatment upon proper application.
- (8) The finding rescinding the sanctions imposed on claimant by Judge Palmer.
- (9) If the permanent disability findings are upheld, then the portion of the award indicating future permanent disability benefits to be paid at the rate of \$214.57 per week rather than at \$28.92 per week.

Claimant raised the following issue to be reviewed by the Appeals Board:

- (A) The claimant's average weekly wage at the time of the injury.

At oral argument the parties acknowledged that the portion of the award on page 4 under the award section which allows \$5,796.44 to be paid at the rate of \$214.57 per week for 200.43 weeks is a typographical error and should read \$5,796.44 to be paid at \$28.92 per week for 200.43 weeks. As such, issue 9 raised by the respondent in its request for review is resolved. Claimant further argued in his brief that the scope of review by the Appeals Board was one of substantial competent evidence. At oral argument

claimant acknowledged review by the Appeals Board is a de novo review of the evidence in the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record including the stipulations of the parties the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was an employee of respondent on November 23, 1992, when he suffered an injury to his back. This is not disputed by respondent. Claimant injured his back while he was attempting to put molding back onto a car. Claimant's responsibilities with respondent included doing body work on cars and did require physical labor on a regular basis. Shortly after suffering the injury, claimant contacted his supervisor, Mr. Don Crow, and informed him of the accident. At that time Mr. Crow, after reviewing an employee manual, advised claimant he was authorized to seek medical treatment from the Reed Medical Group. Mr. Crow testified that he at no time authorized treatment with James T. Brady, D.C., or any other chiropractor. Mr. Crow's testimony was unwavering in that the Reed Medical Group was the required group from whom claimant could seek authorized medical treatment. Any referrals to a chiropractor would have to be made from the Reed Medical Group.

Claimant argues that he was authorized to seek medical treatment and was given the option to either pick the Reed Medical Group or Dr. Brady. While there were several conversations between claimant and his fiancée and Mr. Crow regarding Dr. Brady, the information in the file indicates that Mr. Crow at no time authorized Dr. Brady to be claimant's treating physician. K.S.A. 1992 Supp. 44-510 requires an employer to provide the services of a health-care provider and such medical, surgical, and hospital treatment as may be necessary to cure and relieve the employee from the effects of the injury. If the services of the health-care provider furnished by the employer are not satisfactory to the employee, then K.S.A. 1992 Supp. 44-510(c) allows the employee, without application or approval, to consult a health-care provider of the employee's choice for the purposes of examination, diagnosis or treatment. A significant caveat to this employee right is the fact that the employer shall only be liable for fees and charges of the health-care provider for a total of up to \$350.

Claimant argues that respondent denied claimant medical treatment and claimant was thus forced to continue treating with Dr. Brady. This is not supported by the record. Mr. Crow made it clear that the authorization for claimant to go to the Reed Medical Group was an open authorization and was, at no time, ever rescinded. Claimant's choice to go to Dr. Brady was well within his rights under the Workers Compensation Act but the liability of the respondent for the treatment provided by Dr. Brady is limited to the \$350 maximum set in K.S.A. 1992 Supp. 44-510(c). As such the Appeals Board finds the treatment provided by Dr. Brady to be unauthorized and the appropriate statutory limitations associated with said unauthorized treatment must be imposed. This effectively decides or renders moot the issues numbered 1, 3, 4, and 5 raised by respondent in its request for review.

Respondent further contends that claimant unreasonably refused to cooperate with the employer offered medical treatment. It is clear from the record claimant was reluctant to cooperate, having refused to go to the Reed Medical Group, choosing instead Dr. Brady. It is not so clear, once claimant was referred to Mary Ann Hoffman, M.D., that he unreasonably refused to cooperate with the medical treatment offered. While Dr. Hoffman attempted to get claimant into work hardening programs for a substantial period of time claimant's reluctance to attend those programs stemmed primarily from his desire to work and earn money and not lose wages while attending a full-time work hardening program. Likewise claimant's inability to complete the physical therapy program stemmed from a conflict with the daycare for one of his children. As such the Appeals Board cannot find that claimant unreasonably refused to cooperate with the employer offered medical treatment and respondent's request that claimant be denied benefits under either K.S.A. 44-518 or K.A.R. 51-9-5 is denied.

The Appeals Board will next consider the issue regarding claimant's average weekly wage. Claimant argues that his average weekly wage should be computed based upon an hourly rate resulting in an average weekly wage of \$439.93. Respondent, in the alternative, argues that claimant's average weekly wage should be computed pursuant to K.S.A. 1992 Supp. 44-511(b)(5) which provides a method for computing average weekly wages when the pay rate is based upon employee output, on a commission or percentage basis or on a flat-rate basis for performing a specific job. The testimony of claimant supports a finding that claimant was being paid on a flat-rate or per work basis and not hourly. As such the Appeals Board finds the average weekly wage as computed by the Special Administrative Law Judge is supported by the evidence in the record and the Appeals Board finds claimant's award should be based upon an average weekly wage of \$361.62.

With regard to the nature and extent of claimant's injury and/or disability the Appeals Board finds that the award of the Special Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions as enumerated in the Award of the Special Administrative Law Judge are accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein in awarding claimant a 12 percent permanent partial general disability on a functional basis to the body as a whole. This opinion is reached after considering the opinions of Dr. Hoffman, P. Brent Koprivica, M.D., and Dr. Brady.

Respondent further contends claimant should not have been granted future medical treatment upon proper application to or approval by the Director. While there is significant question regarding whether claimant currently needs medical treatment, it is impossible for the Appeals Board to look into its crystal ball and decide whether claimant will ever have a necessity for future medical care resulting from this injury. A 12 percent whole body functional impairment indicates claimant has sustained some physical trauma to the body which may or may not be fully resolved at this time. By requiring that claimant apply to and

receive approval from the Director of Workers Compensation for future medical care, the Appeals Board, hopefully, is insuring that any future medical needs encountered by claimant will be met, while at the same time protecting the rights of respondent in requiring that evidence be presented to show a connection between the future medical requested and the injury of November 23, 1992.

The Appeals Board must next consider the finding by the Special Administrative Law Judge rescinding the sanctions imposed upon claimant by Judge Palmer for claimant's failure to attend the hearing of April 24, 1995. Claimant acknowledges he forgot about the hearing on April 24 but provides the following explanation: Claimant was advised the week prior to the regular hearing of April 24, 1995, that an uncle, who was very close to claimant and his mother, was seriously ill. Claimant was requested by his mother to provide transportation for the mother to Tulsa, Oklahoma, the home of the uncle. Claimant provided this transportation on the Friday prior to the Monday morning hearing and returned to his home on Sunday evening April 23, 1995. In the confusion, and with many family matters on his mind, claimant apparently went to work on April 24, 1995, and forgot to attend the regular hearing. While Judge Palmer did originally order sanctions against claimant for his failure to appear, the Special Administrative Law Judge rescinded those sanctions finding that the explanation provided by claimant indicated significant mitigating circumstances leading up to claimant's failure to attend the scheduled hearing. The Appeals Board finds the circumstances surrounding claimant's failure to attend the regular hearing on April 24, 1995, do explain claimant's absence from the hearing and the decision by the Special Administrative Law Judge to rescind those sanctions appears appropriate under the circumstances.

It should also be noted that, while the Award of the Special Administrative Law Judge grants claimant one week of temporary total disability compensation, the parties acknowledge that claimant was actually absent from work for one week and six days. As K.S.A. 1992 Supp. 44-510c(b)(1) restricts the payment of compensation during the first week of disability unless and until the temporary total disability exists for three consecutive weeks claimant would be entitled to six days of temporary total disability compensation. The Award of the Special Administrative Law Judge granting claimant one week of temporary total disability compensation should be modified to award claimant six days of temporary total disability compensation at the rate of \$241.03 per week based on an average weekly wage of \$361.52 in the sum of \$207.29.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris dated January 2, 1997, should be, and is hereby, modified and an award is made in accordance with the above findings in favor of the claimant, Dane Griffin, and against the respondent, Dale Willey Pontiac-Cadillac and its insurance carrier, Kansas Motor Carrier Dealers WCF, for an accidental injury sustained on November 23, 1992.

Claimant is entitled to .86 weeks temporary total disability compensation at the rate of \$241.03 per week totaling \$207.29 followed thereafter by 414.14 weeks permanent partial disability compensation at the rate of \$28.92 per week totaling \$11,976.93 for a total award of \$12,184.22.

As of June 5, 1997, claimant is entitled to .86 weeks temporary total disability compensation at the rate of \$241.03 per week totaling \$207.29 followed thereafter by 178.57 weeks permanent partial disability compensation at the rate of \$28.92 per week in the amount of \$5,164.25 for a total due and owing of \$5,371.54. Thereafter claimant is entitled to 235.57 weeks permanent partial disability compensation at the rate of \$28.92 per week totaling \$6,812.68 until fully paid or until further order of the Director.

The medical treatment provided by Dr. James T. Brady is deemed unauthorized medical and claimant is awarded unauthorized medical treatment up to the statutory maximum of \$350 upon presentation of an itemized statement verifying same.

Claimant is further granted future medical treatment upon proper application to and approval by the Director. The sanctions imposed upon claimant by Administrative Law Judge Floyd V. Palmer are herein rescinded per the Award of the Special Administrative Law Judge.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 1992 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Curtis, Schloetzer, Hedberg, Foster & Associates	
Deposition of Don Crow	\$206.95
Deposition of Natalie Griffin	367.75
Deposition of James T. Brady, D.C.	614.95
Deposition of Donald Lee Crow	115.73
Alpino & Biggs Reporting Service	
Transcript of regular hearing	\$ 72.00
Transcript of regular hearing	264.40
Transcript of regular hearing	521.60
AAA Reporting Company	
Deposition of Mary Ann Hoffman, M.D.	\$431.30
Deposition of Howard Dale Willey	178.07
Deposition of Barbara Base	79.40
Deposition of John L. Cowley	129.50

Deposition of P. Brent Koprivica, M.D.

Unknown

Special Administrative Law Judge Fee

\$150.00

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Topeka, KS
Jeffrey D. Slattery, Kansas City, MO
Floyd v. Palmer, Administrative Law Judge
Philip S. Harness, Director